No. 11969

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD J. McBRIDE, doing business as CONTINENTAL PRESS SERVICE,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

This is an appeal from the Order and Judgment of the United States District Court for the Southern District of California, Central Division, by the Honorable J. F. T. O'Connor, United States District Judge, denying Appellant's request for a preliminary injunction and for an order directing Appellee to restore interstate Morse wire service between Appellant and the Consolidated Publishing Company of Los Angeles, California, entered May 24, 1948 [R. 78-99].

The jurisdiction of the District Court was based upon 28 U. S. C. A. §41 (1) (Diversity of citizenship and matter in controversy exceeding $3,000.00); F. R. C. P.

Rule 65 (Injunctive relief); and §406 of the Communications Act of 1934, as amended, 47 U. S. C. A., §406 (Mandamus).

This Court has jurisdiction to entertain this appeal from the denial of the preliminary injunction under the provisions of Sections 128 and 129 of the Judicial Code, as amended, 28 U. S. C. A., §§225 and 227.

The order and judgment of the District Court that Appellant is not entitled to maintain this action is a final decision and appealable to this Court under §128 of the Judicial Code, 28 U. S. C. A., §225.

Meehan v. Valentine, 145 U. S. 611, 36 L. Ed. 835;

Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. Ed. 55;

Wilson v. Republic Iron & Steel Co., 257 U. S. 92, 66 L. Ed. 144;

Modin v. Matson Nav. Co. (9 Cir.), 128 F. (2d) 194.

Also, an order denying relief by way of mandamus is a final order.

Davies v. Corbin, 112 U. S. 36, 28 L. Ed. 627;

Hartman v. Greenhow, 102 U. S. 672, 26 L. Ed. 271.

Statement of the Case.

Appellant filed a Complaint in the District Court for the Southern District of California on April 22, 1948, alleging two causes of action—the first asserting a right to an order directing Appellee, The Western Union Telegraph Company, to restore Appellant's interstate Morse wire service between Appellant and the Consolidated Publishing Company (sometimes hereinafter referred to as "Consolidated"), of Los Angeles, California, under the provisions of §406 of the Communications Act of 1934, as amended, 47 U. S. C. A., §406; and the second asserting a right to a preliminary and permanent injunction restraining and enjoining Appellee from refusing to furnish Appellant said service [R. 2-12].

On April 22, 1948, an Order to Show Cause and Temporary Restraining Order was signed by the Judge of the District Court whereby Appellee was enjoined from refusing to furnish Appellant with the interstate Morse wire service between Appellant and its customer, Consolidated, and a hearing on the Order to Show Cause was set for the 30th day of April, 1948 [R. 20-22].

Two affidavits were filed on behalf of Appellant in support of the Order to Show Cause why a mandatory order should not be granted restoring the interstate Morse wire service between Appellant and its customer, Consolidated, or why a preliminary injunction should not issue enjoining Appellee from refusing to furnish such service [R. 13-17].

On May 5, 1948, Appellee filed its Answer and the affidavit of J. W. Inwood responsive to the Order to Show Cause and Temporary Restraining Order [R. 23-34]. The Order to Show Cause came on for hearing on May 5, 1948, and the District Court ordered that the temporary restraining order be vacated; the request for the preliminary injunction be denied, and that the mandatory order requested by Appellant be likewise denied [R. 77].

On May 21, 1948, Appellee filed proposed findings of fact and conclusions of law which were signed by the Judge of the District Court on May 24, 1948. Judgment was entered and docketed on May 24, 1948 [R. 78-98].

The District Court concluded, as a matter of law, among other things, that Appellant was not entitled to a preliminary injunction or to a mandatory or any order that said leased facilities be restored, and that Appellant was not entitled to maintain the action [R. 97].

In its Findings of Fact the Court also, among other things, found that it was not true that the refusal and failure of Appellee to supply Appellant with interstate Morse wire facilities had caused or would cause Appellant irreparable damage [R. 92].

On June 3, 1948, Appellant filed Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit from the order of the District Court denying the request for a preliminary injunction and for a mandatory order directing restoration of Appellant's interstate Morse wire service [R. 98].

Summary of the Facts.

There is no dispute between the parties as to the facts, and they are set forth in the pleadings and supporting affidavits.

Appellant, an individual doing business under the fictitious name and style of Continental Press Service (sometimes hereinafter referred to as "Continental Press"), is engaged in the business of disseminating general news, including sporting and racing news, over the interstate and foreign Morse wire facilities of Appellee, The Western Union Telegraph Company. Appellant's principal office is located in Cleveland, Ohio, and two other offices are located in Chicago, Illinois, and New York, New York. Appellant receives news of all types, including sporting and racing news, from throughout the North American continent, which it transmits over interstate Morse wire facilities leased from Appellee to its offices in Chicago. From its Chicago office the news is sent over interstate Morse wires leased from Appellee to customers throughout the United States, Canada and Mexico, among which are newspapers, radio stations and daily racing publications, usually referred to as "scratch sheets" [R. 17].

When Appellant accepts a new customer, it arranges for Appellee to connect that customer on to the interstate Morse wire, and, in case of a discontinuance, arrangement is made to disconnect the wire facilities to that particular customer. The transcontinental wire, which is leased from Appellee, passes through California and is used solely for the transmission of Appellant's news throughout the various states and into Canada and Mexico, and the transmission of news thereon continues irrespective of the number of customers connected or disconnected in California or elsewhere [R. 18].

The main interstate Morse wire in question, which is leased by Appellant from Appellee, at the present time crosses almost every state in the Union, including California, and extends into Canada and Mexico [R. 18].

General news and sporting news, other than racing news, constitutes from thirty to fifty per cent of the news furnished by Appellant to its customers. Those customers are free to distribute the news received from Appellant in any manner or fashion they desire. Charges for such news service are based upon area, population and other similar factors, and Appellant does not have any proprietorship or ownership interest in the business of its customers [R. 19].

The Consolidated Publishing Company of Los Angeles, California, is a customer of Appellant, and, prior to April 2, 1948, received, by direct connection with the leased interstate line of Appellant, all types of news, including sporting and racing news, for which it paid Appellant approximately five hundred ($500.00) dollars a week [R. 19].

Consolidated Publishing Company is engaged in the business of disseminating sporting news, principally racing news, by means of daily and weekly publications which it prints in its own plant located at 615 North La Brea Avenue, Los Angeles, California. Consolidated prints and publishes the following daily racing news sheets, commonly referred to as "scratch sheets": Metropolitan Scratch Sheet, Reporter Scratch Sheet and Blue Sheet. A morning and an afternoon edition is printed each day except Sunday of the Metropolitan Scratch Sheet and Reporter Scratch Sheet. The Blue Sheet is printed once daily except Sunday. Each week Consolidated sells approximately 100,000 daily scratch sheets [R. 13]. In

addition, Consolidated publishes two weekly sporting papers, the Reporter Weekly and the Hollywood Observer, which are issued on Friday and have a circulation of 2,800 copies per week [R. 14].

Consolidated conducts its operations at the address on La Brea Avenue, and at such place maintains both its offices and printing presses. The real estate is under lease and has an additional two years to run. The printing presses and other equipment owned by Consolidated and used to conduct its business are presently valued at approximately $100,000. It has approximately 65 employees and maintains the usual business offices with books and records to reflect its social security program, unemployment insurance, withholding taxes, State and Federal income taxes, city license taxes and various other data necessary to the usual conduct of a business. The Company also has union contracts which obligate the company to provide severance and accumulated vacation pay [R. 14].

Consolidated's publications are sold throughout the State of California and in Nevada. Metropolitan Scratch Sheet is admitted to second-class mailing privileges [R. 14].

The publications of Consolidated are distributed in Los Angeles by means of route men in a manner similar to that employed by metropolitan newspapers. Each day a route carrier would call upon a newsstand operator and deliver the number of scratch sheets requested by the news dealer. The following day when the route man called, he would be paid for the scratch sheets delivered the previous day but would allow credit to the newsstand operator for those remaining unsold. Consolidated had no proprietary interest in the newsstands and the relationship was solely that of seller and buyer [R. 15].

In order to develop its circulation, Consolidated carried in each issue of its publication an advertisement in which

telephone numbers were listed so that the public might call Consolidated's offices for the purpose of obtaining racing results—this practice being identical with that furnished by its competitor in Los Angeles, the National Scratch Sheet [R. 15].

On April 2, 1948, Appellee interrupted and discontinued the news service by which Appellant supplied news to Consolidated over the interstate Morse wire facilities. Consolidated desires the restoration of this news service, and is ready, willing and able to continue to purchase news from Appellant [R. 16].

The discontinuance of the news service between Appellant and Consolidated arose from a series of events beginning with an investigation by the Public Utilities Commission of California.

Some time prior to February 18, 1948, the Public Utilities Commission of the State of California instituted a proceeding before said Commission entitled "Case No. 4930—Investigation on the Commission's own motion into the use being made of communications facilities and instrumentalities for the purpose of determining if such use, in any instance, is in violation of law or is aiding or abetting, directly or indirectly, a violation of law or is not in the public interest." Hearings were held on four occasions in February, 1948, and on one occasion in March, 1948, and the Commission ordered that any communications utility operating under the jurisdiction of the Commission must discontinue and disconnect service to a subscriber whenever it had reasonable cause to believe that the use made or to be made of the service was prohibited by law or was being used to violate or to aid and abet the violation of the law. The order further provided that a written notice to such utility from any official charged with the enforcement of the law stating that such service

was being so used was sufficient to constitute such reasonable cause [R. 56-70].

On March 31, 1948, Fred N. Howser, the Attorney General of California, addressed a letter to Appellee in which attention was directed to the hearings before the Public Utilities Commission. In the letter it was stated that the hearings indicated (without specifying in what manner) Appellee had leased wires to Appellant which were engaged in furnishing information to bookmakers in violation of the Penal Code of the State of California at various addresses, one of which was 615 North La Brea Avenue, Los Angeles, the address of Consolidated Publishing Company. The letter then demanded that Appellee immediately discontinue the leasing of any and all equipment to the Appellant, Continental Press Service in California [R. 73-75].

The Attorney General did not supply Appellee with any facts indicating that Appellant or its customer, Consolidated, was violating any law of the State of California or of the United States [R. 35].

Appellee had no knowledge or information as to the type of news being disseminated by Appellant and received by its customer, Consolidated, and had no knowledge or information concerning the manner or method of operation of the business of Appellant or its customer, Consolidated [Para. 4 and 7, Appellee's Answer, R. 38, 49, 50].

However, on April 2, 1948, pursuant to the order of the Public Utilities Commission of the State of California and the letter of the Attorney General, Appellee discontinued the wire service between Appellant and its customer, Consolidated Publishing Company [R. 48].

Appellant thereafter instituted this suit to compel restoration of its leased Morse interstate wire [R. 2].

SPECIFICATIONS OF ERROR.

I.

The District Court Erred in Its Twelfth Conclusion of Law That Appellant Is Not Entitled to Maintain This Action.

A. Communication of Appellant's news over wire facilities between states is interstate commerce.

B. By the Federal Communications Act of 1934 and earlier acts, Congress brought the field of interstate wire communications under exclusive Federal control.

C. Appellant's Complaint states a cause of action under the Communications Act which entitles Appellant to relief in the District Court.

II.

The District Court Erred in Its Sixth Conclusion of Law Requiring Appellant to Resort to Either the Federal Communications Commission or the California Public Utilities Commission for Any Action or Relief.

A. It was error for the District Court to require Appellant to seek relief from the Federal Communications Commission since the issue is not the reasonableness of Tariff Regulation No. 219 but whether Appellant can compel restoration of service improperly denied him.

B. The District Court erred in requiring Appellant to resort to the California Public Utilities Commission for any action or relief, since that Commission has no jurisdiction over interstate commerce.

III.

The District Court Erred in Its Tenth Conclusion of Law That Appellant Is Not Entitled to Any Order Compelling Restoration of His Service.

A. Distribution of racing news does not directly or indirectly violate any federal or state law and is recognized in California as a legitimate business.

B. Under the Rules of Decision Act and *Erie v. Tompkins* doctrine, the District Court was bound to follow the decision of the State Court in the *Brophy* case which upheld the legality of disseminating racing news.

C. Where a utility company is asked to restore service, it must exercise independent judgment as to whether customer is violating the law and may not rely on unsubstantiated statements of law enforcement officers.

IV.

The District Court Erred in Its Seventh and Eighth Conclusions of Law Requiring (a) That the Attorney General of the United States Make Application to Said Court Alleging a Violation of the Communications Act and (b) That the Mandamus Action Be Maintained Upon the Relation of a Person Alleging a Violation of Said Act.

V.

The District Court's Finding of Fact That Appellant Does Not Show Irreparable Damage Is Not Supported by the Record; and the Court Further Erred in Denying Appellant's Request for a Preliminary Injunction.

ARGUMENT.

SPECIFICATION OF ERROR I.

The District Court Erred in Its Twelfth Conclusion of Law That Appellant Is Not Entitled to Maintain This Action.

A. Communication of Appellant's News Over Wire Facilities Between States Is Interstate Commerce.

Appellant is engaged in the business of disseminating general news, including sporting and racing news, over the interstate and foreign Morse wire facilities of The Western Union Telegraph Company. The news is received from throughout the North American continent and is transmitted by Appellant over the facilities of Western Union to Appellant's office in Chicago, Illinois. From its Chicago office, the news is sent over the interstate Morse wires to customers throughout the United States, Canada and Mexico. Consolidated Publishing Company of Los Angeles, California, is a customer of Appellant and receives, by direct connection with Appellant's main interstate line, all types of news disseminated by Appellant, including sporting and racing news.

It could hardly be doubted that the transmission by Appellant of its news over the leased wire facilities of Western Union from Chicago, Illinois, to the Consolidated Publishing Company in Los Angeles, California, is interstate commerce, and that it continues as such until it reaches the offices of the Consolidated Publishing Company.

Under Article I, Section 8, Clause 3 of the United States Constitution, Congress is given the power to "regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." Chief Justice

Marshall, in *Gibbons v. Ogden,* 9 Wheat. (U. S.) 1, 6 L. Ed. 23, interpreted the word "commerce," as used in the Constitution, to mean commercial intercourse in all its branches among the various states. The United States Supreme Court has held in a long series of decisions that interstate telegraph communication is within the protection of the commerce clause in the Federal Constitution.

> *Western U. Teleg. Co. v. Lenroot,* 323 U. S. 490, 502, 89 L. Ed. 414, 423;
>
> *Western U. Teleg. Co. v. James,* 162 U. S. 650, 654, 40 L. Ed. 1105, 1106;
>
> *Western U. Teleg. Co. v. Pendleton,* 122 U. S. 347, 350, 30 L. Ed. 1187, 1188;
>
> *Western Union Telegraph Co. v. State of Texas,* 105 U. S. 460, 26 L. Ed. 1067.

The Supreme Court, in *Western Union Telegraph Co. v. James, supra,* stated, at page 654:

> "It has been settled by the adjudications of this court that telegraph lines, when extending through different states, are instruments of commerce which are protected by the above clause in the Federal Constitution, and that the messages passing over such lines from one state to another constitute a portion of commerce itself."

In the case of *Western Union Telegraph Co. v. State of Texas, supra,* the Court said, at page 461:

> "A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects

different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits."

The Supreme Court ruled in *Western Union Tel. Co. v. Foster,* 247 U. S. 105, 62 L. Ed. 1006, that telegraphic transmission of quotations of the New York Stock Exchange to the Boston offices of telegraph companies from which they were transmitted by an operator to tickers in the offices of brokers within the state who subscribed for such service, did not lose its character as interstate commerce until it was completed in the brokers' offices. Speaking for the Court, Justice Holmes said, at page 114:

> "It is admitted that the transmission from New York to Massachusetts by the telegraph company was interstate commerce. If so, it continued such until it reached 'the point where the parties originally intended that the movement should finally end.' "

B. By the Federal Communications Act of 1934 and Earlier Acts, Congress Brought the Field of Interstate Wire Communications Under Exclusive Federal Control.

The Federal Communications Act was passed by Congress in 1934 for the purpose of regulating wire and radio communication in interstate and foreign commerce, 47 U. S. C. A., §201 *et seq.* Prior to that Act, Congress, in the Interstate Commerce Act of 1910, had given regulatory power over interstate wire communication companies to the Interstate Commerce Commission.

The Federal Communications Act contemplates the regulation of interstate wire communication from its inception to its completion. It created the Federal Communications Commission to carry out the policy of the Act

and to exercise jurisdiction over common carriers engaged in wire and radio communication in interstate and foreign commerce. 47 U. S. C. A., §201 *et seq.*

In the report of the Committee on Interstate Commerce by Mr. Dill to the Senate on April 17, 1934, it was stated (Senate Report No. 781, 73d Congress, 2d Session, Calendar No. 830):

> "The purpose of this bill is to create a communications Commission with regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable or radio * * *. Since 1910, the Interstate Commerce Commission has had some jurisdiction over telephone, telegraph and wireless common wires. Likewise, the Postmaster General has certain jurisdiction over these companies. There is a vital need for one commission with unified jurisdiction over all of these methods of communication."

O'Brien v. Western Union Tel. Co. (1st Cir.), 113 F. (2d) 539, at page 541:

> "Congress having occupied the field by enacting a fairly comprehensive scheme of regulation, it seems clear that questions relating to the duties, privileges and liabilities of telegraph companies in the transmission of interstate messages must be governed by uniform federal rules. This conclusion is fortified by decisions under the Interstate Commerce Act, 49 U. S. C. A., §1 *et seq.*, which was applicable to telegraph companies prior to the passage of the Communications Act of 1934."

See, also, *United States v. American Telephone & Telegraph Co.* (D. C., N. Y.), 57 Fed. Supp. 451, aff'd 325 U. S. 837, 89 L. Ed. 1964.

Decisions under the Interstate Commerce Act, 49 U. S. C. A. §1 *et seq.,* show clearly that prior to the Federal Communications Act, Congress required national uniformity in the regulation of interstate telegraph and telephone service.

Western U. Teleg. Co. v. Boegli, 251 U. S. 315, 64 L. Ed. 281;

Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U. S. 27, 64 L. Ed. 118.

The Supreme Court, in *Western Union Teleg. Co. v. Boegli, supra,* declared, at page 316:

> "* * * we are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, * * *"

Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., supra, at page 31:

> "But we need pursue the subject no further, since, if not technically authoritatively controlled, it is in reason persuasively settled by the decision of the Interstate Commerce Commission * * * and by the numerous and conclusive opinions of state courts of last resort, which, in considering the Act of 1910

from various points of view, reached the conclusion that that act was an exertion by Congress of its authority to bring under Federal control the interstate business of telegraph companies, and therefore was an occupation of the field by Congress which excluded state action * * *" (Citations omitted.)

C. Appellant's Complaint States a Cause of Action Under the Communications Act Which Entitles Appellant to Relief in the District Court.

By §406 of the Communications Act, the District Courts of the United States are given jurisdiction by mandamus to compel restoration of interstate Morse wire service by a carrier subject to the Act where plaintiff alleges in his complaint violations of the Act by said carrier, 47 U. S. C. A. §406.

Section 406 of the Act provides as follows:

> "The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ: *Provided,* That if any question of fact as to the proper compensation to the carrier for the service to be enforced by the writ

> is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper pending the determination of the question of fact: *Provided further,* That the remedy hereby given by writ of mandamus shall be cumulative and shall not be held to exclude or interfere with other remedies provided by this chapter."

It is specifically provided in the Act that every common carrier engaged in interstate communication by wire or radio must furnish such communication service to anyone who makes reasonable request for same. 47 U. S. C. A. §202(a). The Communications Act further provides in §202(a) that:

> "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in * * * facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

Since on or about the 19th day of May, 1945, Appellee, Western Union, has leased to Appellant a private telegraph wire or channel for telegraph communication from Chicago, Illinois, by way of Los Angeles, San Francisco, Portland, Oregon and intermediate cities in the several states traversed by said wire to Seattle, Washington with connected wires or channels extending from said private

leased wire or channel at various points and places in the states traversed by said line, including a connection to the Consolidated Publishing Company in Los Angeles, California. On April 2, 1948, the connection of Consolidated Publishing Company with Appellant's interstate Morse wire was terminated by Appellee.

Appellant here urges that it has a clear, legal right to the leased wire facility so withheld. As hereinabove noted, a telegraph company subject to the Communications Act cannot discriminate among its customers seeking private leased wires, but must make such private wires available to applicants with even-handed impartiality and cannot grant them to one patron and arbitrarily refuse them to another.

> *Postal Teleg.-Cable Co. v. Associated Press,* 228 N. Y. 370, 127 N. E. 256;
>
> *N. Y. Telephone Co.,* P. U. R. 1932A 262;
>
> *Matter of Private Wire Contracts,* 50 I. C. C. Report, 731, 756.

The Court, in the *Postal Telegraph-Cable Co.* case, *supra,* states at page 256, N. E.:

> "An interstate telegraph company must offer private wires within the limits of capacity to those who need them with even-handed impartiality under Interstate Commerce Act, §1, subd. 3, and §§2, 3."

And, also at page 260, N. E.:

> "In all that I have written, I have gone on the assumption that the plaintiff,when it made contracts for private wires, was acting as a common carrier within the definition of the act of Congress, and was subject to the duties inhering in that relation. * * * Private wires have become an important branch of

the telegraph business. They are given, not only to the press, but to bankers and brokers and many others. * * * They must be offered to those who need them with even-handed impartiality. A public service corporation is not at liberty to grant extraordinary facilities to one man, and arbitrarily refuse them to another. It need not depart from the beaten track at all. If it does, it must not govern the deviation by prejudice or favor. What it grants to one, it must, in like conditions, when detriment would follow preference grant impartially to all, within the limits of capacity."

It was said in *N. Y. Telephone Co., supra,* that it is the duty of a telephone company which holds itself out to render leased wire service to furnish such service to a broadcasting station. The Court said, at page 268:

"The question here presented, however, goes far beyond reasonable rules and regulations. It goes to the very essence of the business and to the question of who shall be served by the company. In effect, the company claims the right to say what part of its business it will elect to do. If the company has no legal right to do a 'leased-wire' business, it must stop doing such business with those who have already applied and to whom it has granted these facilities. If this is a legal part of its business, it must come under regulation and the company must serve all who apply under proper conditions for service."

Matter of Private Wire Contracts, 50 I. C. C. Report 731, at page 756:

"Some question is raised regarding our jurisdiction on the ground that respondents are subject to the act only in so far as they are engaged in the "transmis-

> sion of messages" and that in rendering the private-wire service they merely lease facilities, the messages being transmitted by the lessees. With this refinement, we cannot agree. It is true that by providing his own operators the private-wire lessee receives a service that differs in some respect from that rendered to the general public. The fallacy of the argument is, however, clearly shown when it is remembered that the service rendered to the private wire lessee corresponds very closely with that furnished by telephone companies to their subscribers."

It is not entirely clear upon what theory the District Court predicated its conclusion that Appellant was not entitled to maintain this action. Apparently it was the view of the Court that resort should have been had to the Federal Communications Commission. Such a theory seems entirely inconsistent with the language of Sec. 406 of the Communications Act, which specifically provides a remedy by way of mandamus in the District Courts. If such a conclusion is correct, it is difficult to comprehend for what purpose Sec. 406 was passed by Congress and what was intended by its language. It is also significant that the last proviso of Sec. 406 states that the remedy given by writ of mandamus "shall be cumulative and shall not be held to exclude or interfere with other remedies provided by this chapter."

There can be no doubt that Appellant's communications were wholly interstate in nature and subject to the exclusive control of the Federal Government by virtue of Congressional action; yet the District Court concluded that Appellant had no remedy in the District Court, and by so doing stripped Sec. 406 of any meaning for practical purposes.

The more reasonable interpretation of Sec. 406 would afford one prevented from receiving service in interstate communications, such as in the instant case, a speedy and appropriate remedy while the contrary interpretation denies that right and affords only the slow and costly resort to the Federal Communications Commission in Washington, D. C. On the one hand, the relief before the Federal Communications Commission can be obtained only after a considerable period of time whereas by way of mandamus the remedy is speedy and effective if the right is clear. Certainly it must have been that Congress contemplated giving one deprived of interstate-communication service an effective and immediate remedy, such as was provided for under Sec. 406.

The decision of the District Court made no differentiation between the two separate causes of action set forth in the complaint—one purporting to allege grounds for injunctive relief and the other purporting to allege grounds for relief under Sec. 406. If Sec. 406 afforded no relief, it would seem that the record clearly indicates a case in which the District Court had both the jurisdiction and all of the substantive elements required for the exercise of equitable relief by way of injunction. There appears to be no question that the Court did have jurisdiction, and that if Sec. 406 afforded no relief, then Appellant was without adequate remedy at law and entitled to equitable relief through the medium of an injunction restraining Appellee from discontinuing an interstate-communication service to which Appellant was rightfully entitled.

SPECIFICATION OF ERROR II.

The District Court Erred in Its Sixth Conclusion of Law Requiring Appellant to Resort to Either the Federal Communications Commission or the California Public Utilities Commission for Any Action or Relief.

A. It Was Error for the District Court to Require Appellant to Seek Relief from the Federal Communications Commission Since the Issue Is Not the Reasonableness of Tariff Regulation No. 219 But Whether Appellant Can Compel Restoration of Service Improperly Denied Him.

The District Court apparently concluded that Appellant is required to apply to either the Federal Communications Commission or to the California Public Utilities Commission for any action or relief by either of said commissions against Appellee for or on account of any of the matters alleged in the complaint [R. 96].

First, with reference to the Federal Communications Commission, it is the contention of Appellant that Section 406 of the Communications Act discussed in Specification of Error I provides him with an adequate remedy for relief from Appellee's refusal to provide Appellant with interstate Morse wire service between Appellant and its customer, the Consolidated Publishing Company of Los Angeles, California.

Tariff F. F. C. No. 219 reads in part:

> "(8) The service: * * *
>
> "Facilities furnished under this tariff shall not be used for any purpose or in any manner directly or indirectly in violation of any federal law or the laws of any of the states through which the circuits pass or the equipment is located, and the telegraph company

> reserves the right to discontinue the service to any drop or connection or to all drops and connections when it receives notice from federal or state law enforcing agencies that the service is being supplied contrary to law;"

The regulation merely requires that the facilities furnished by Western Union shall not be used for any purpose or in any manner directly or indirectly in violation of any Federal law or the laws of any of the states. The issue presented by the pleadings is simply whether or not Appellant is entitled to the private wire facilities of Western Union which he has heretofore had in use. It is submitted that under Tariff Regulation No. 219, Appellant has a concomitant right to compel restoration of service unless Appellant is actually engaged in an illegal business. The question of whether or not notice from a Federal or state law enforcement agency is a legal ground for termination of the facilities is of no moment since that act has already transpired and its legal effect would be relevant only in a proceeding relating to the efficacy of such a provision as contained in Tariff Regulation No. 219.

As a matter of fact, Appellee has at no time contended that Appellant or its customer, Consolidated, is or was engaged in any illegal activity, but has predicated its case solely upon notice from the Attorney General and the Public Utilities Commission of California. It is not believed that Appellee will challenge Appellant's contention that the facts set forth in his complaint and supporting affidavits establish beyond any reasonable doubt that Appellant's business of disseminating sporting news, including racing news, over the interstate private wire facilities of Western Union to its customers throughout the United States, including its customer the Consolidated

Publishing Company of Los Angeles, California, is a legitimately recognized business. The affidavit filed by Appellee in opposition to the Order to Show Cause Why a Preliminary Injunction or a Mandatory Order Should Not Issue, does not set forth any facts to show that Appellant or his customer, Consolidated Publishing Company, was or is engaged in an illegal business, or was or is directly or indirectly violating any Federal or state law [R. 23-34]. On the contrary, the pleadings and affidavits of both parties establish without question that Appellant was supplying racing news to the Consolidated Publishing Company of Los Angeles over an interstate Morse wire and that such activity was in no way illegal.

Appellant insists that §406 of Title 47, U. S. C. A., provides him with a specific remedy to compel Western Union to restore the discontinued interstate Morse wire service and that the District Court has jurisdiction and power to order the service restored.

Again referring to the legislative history of the Communications Act of 1934, as amended, Appellant directs attention to the report of the Committee on Interstate Commerce reported in the Senate by Mr. Dill on April 17, 1934 (Senate Report No. 781, 73d Congress, 2d Session, Calendar No. 830):

> "Section 406 makes Section 23 of the Interstate Commerce Act relating to the furnishing of facilities applicable to communications. This remedy is limited to the performance of duties which are so plain and so independent of administrative action by the Commission as not to require a finding by that body (*Baltimore & Ohio R. R. v. U. S.*, 215 U. S. 481). The Commission alone has jurisdiction to determine whether an existing regulation affecting rates, or any

other practice is unreasonable, or unjustly discriminatory, and the courts cannot by mandamus control its exercise of these administrative functions. (*Morrisdale Coal Co. v. Penn. R. Co.,* 183 Fed. 929.)"

A review of the pertinent decisions relating to remedy in the District Court as against pursuing an administrative remedy before the Federal Communications Commission or its predecessor, the Interstate Commerce Commission, shows without doubt that Appellant has pursued the appropriate remedy by resorting to the District Court for relief and that the District Court erred in concluding that it was without jurisdiction to hear the controversy. There is no tariff question involved in this suit. Rather, the controversy between the parties concerns a matter the answer to which does not turn on any administrative question or questions of fact peculiarly within the scope and authority of the Federal Communications Commission. It concerns a question of general law to be adjudicated by the Court, and one which the Commission, as a purely administrative body, is not uniquely qualified to entertain.

Louisville & Nashville R. R. Co. v. F. W. Cook Brewing Company, 223 U. S. 70, 56 L. Ed. 355;

Penn. R. R. Co. v. Puritan Coal Mining Co., 237 U. S. 121, 59 L. Ed. 867;

Macon, D. & S. R. Co. v. General Reduction Co., (5th Cir.), 44 F. (2d) 499, cert. den. 283 U. S. 821, 75 L. Ed. 1436.

In *Louisville & Nashville Railroad Company v. F. W. Cook Brewing Company,* 223 U. S. 70, 56 L. Ed. 355, an Indiana corporation brought suit in a Federal Circuit Court to enjoin an interstate common carrier from refusing to accept interstate shipments of intoxicating liquors

consigned to local-option points in Kentucky. There was in force at the time a Kentucky statute which forbade any transportation of intoxicating liquor into Kentucky. In compliance with that law, the defendant carrier filed with the Interstate Commerce Commission a printed circular letter which set out the full text of the Act. Concerning itself with the objection raised by defendant that plaintiff could not invoke the jurisdiction of the courts without first applying to the Interstate Commerce Commission, since the circular notice of the company had been filed with said Commission, the Court said, at page 359:

> "Why should the brewing company have made complaint to the Commission? What relief could it afford? There was no tariff question. There was no discrimination against shipments tendered by complainant and like shipments tendered by other brewers to the same points. * * * To say that there was a discrimination between shipments of intoxicants and other commodities does not make a case of discrimination or preference where the denial of such shipments is based, as is the case here, wholly and solely upon an illegal restraint upon that kind of interstate commerce, is to reason in a circle, for *the question comes back at last to the validity of the law forbidding such shipments.* There was no discrimination if the law was valid, and the result must turn not upon any administrative question or questions of fact within the scope of the power of the Commission, but upon the validity of the legislation which controlled the action of the carrier. *That is a question of general law, for a judicial tribunal, and one not competent for the Commission as a purely administrative body.*" (Emphasis supplied.)

Pennsylvania Railroad Co. v. Puritan Coal Mining Co., 237 U. S. 121, 59 L. Ed. 867, at pages 131-132:

> "In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. * * *
>
> "But if the carrier's rule, fair on its face, has been unequally applied, * * * there is no administrative question involved, the courts being called on to decide a mere *question of fact as to whether the carrier has violated the rule to plaintiff's damage.* Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts." (Emphasis supplied.)

In the *Macon D. & S. R. Co.* case, *supra,* the Court distinguishes between an attack on a regulation of I. C. C. on the ground of unreasonableness and an attack directed against the carrier itself under the court's mandamus jurisdiction in Section 23 on the specific question of whether plaintiff's rights under the Act had been invaded by the action of the carrier. Plaintiff shipper claimed that the material was Fuller's earth, a product which carried a higher established rate under the tariff regulation of the company. In upholding plaintiff's right to mandamus proceedings, the Court ruled that where the unfair application of the rule or regulation to plaintiff's damage is in issue, no question of an administrative nature is presented. Said the Court at page 501:

> "The sole question is whether the material tendered is Fuller's earth, a question on which the commission has no superior knowledge. It is also a question

whose answer has no general importance, for it may arise as to each car tendered anywhere, and will depend on an examination of each shipment for itself. *A shipper is not to be required to undertake an expensive litigation before the commission in each disputed shipment in order to secure its acceptance at the proper published rate.* He may pay the demanded rate and sue in court for the overcharge, or in case of discrimination, as here, the statute permits enforcement of the rate by mandamus." (Emphasis supplied.)

In the light of the foregoing authorities, it becomes clear that the issue of whether or not Appellant conducts a legal business is not a matter for decision by the Federal Communications Commission, but is one which Congress, under the terms of Section 406 of the Communications Act, has properly directed to the District Court.

B. The District Court Erred in Requiring Appellant to Resort to the California Public Utilities Commission for Any Action or Relief, Since That Commission Has No Jurisdiction Over Interstate Commerce.

Appellant believes that there can be little doubt that the District Court erred in requiring Appellant to seek relief from the California Public Utilities Commission. Appellant is engaged in interstate commerce and is convinced that the instant controversy is one arising under the Federal Communications Act. If so, no reasonable purpose can be served by subjecting Appellant to the regulation of any state regulatory commission. Appellant is not unmindful of the provisions in the Communications Act wherein Congress expressly permits the state to exercise jurisdiction over common carriers subject to the Act as to

their purely intrastate communication service. 47 U. S. C. A., §152(b). Appellant reiterates that the wire service provided by Western Union between Appellant and the Consolidated Publishing Company is entirely interstate and, therefore, completely outside the jurisdiction of the California Public Utilities Commission. This conclusion is supported by all of the authorities, including: *Gibbons v. Ogden, supra; Western Union Tel. Co. v. Foster, supra.*

As the record discloses, at page 86, the District Court found the exclusively interstate character of Appellant's business with the Consolidated Publishing Company:

> "(e) Each of said drops was so maintained and operated as that any message initiated thereat could be and was immediately transmitted to all other drops connected with said leased line in the various states traversed by said line, including all of said drops connected with said leased line in California;"

A parallel case, *Western Union Tel. Co. v. Foster, supra,* is particularly significant. The facts in that case are as follows:

The New York Stock Exchange entered into contracts with Western Union whereby the Exchange agreed to furnish to Western Union and its subsidiary companies in the different states simultaneously, full and continuous quotations of prices made in transactions upon the exchange. Western Union, in turn, would furnish these quotations to its subscribers. The information would be sent over the Morse wires of the Western Union Company to the office of its subsidiary and, thence, would be transmitted by an operator to the tickers in the offices of the brokers who had subscribed for the service. Under its contract with the New York Stock Exchange, Western Union could give

such service only to those subscribers who had been approved by the Exchange. A stock broker in Boston who had not been approved for such service brought a petition before the Public Service Commission of Massachusetts, requesting that said Commission order Western Union to furnish him ticker service which was being furnished by the telegraph company from New York to its subsidiary in Boston and from that subsidiary to various subscribers in the city of Boston.

The Massachusetts Public Service Commission ordered Western Union to furnish such service, declaring the refusal an unlawful discrimination. The order of the Public Service Commission was affirmed by the Supreme Court of the state. An appeal was taken to the United States Supreme Court on the ground that the order of the Commission was a violation of the interstate commerce clause and that there was no authority on the part of the Public Service Commission to make such an order. Speaking for the Court, Justices Holmes declared, at page 112:

> "It is enough that, in our opinion, the transmission of the quotations did not lose its character of interstate commerce until it was completed in the brokers' offices, *and that the interference with it was of a kind not permitted to the states.*" (Emphasis supplied.)

and, at page 114:

> "If the transmission of the quotations is interstate commerce, the order in question cannot be sustained. It is not like the requirement of some incidental convenience that can be afforded without seriously impeding the interstate work. It is an attempt to affect in its very vitals the character of a business generically withdrawn from state control,—to change the criteria by which customers are to be determined, and so to change the business. * * *

> *The regulation in question is quite as great an interference as a tax of the kind that repeated decisions have held void. It cannot be justified 'under that somewhat ambiguous term of "police powers".'"* (Emphasis supplied.)

The highest Court in California in the past has also prevented unauthorized assumption of jurisdiction by the Public Utilities Commission of that State over carriers doing business in interstate commerce.

See:

Meyers v. R. R. Commission, 218 Cal. 316, 23 P. (2d) 26;

People v. Yahne, 195 Cal. 683, 235 Pac. 50.

In view of the foregoing authorities, one cannot refrain from speculating as to what prompted the Public Utilities Commission of California to inject itself into the interstate communications of Appellant. The Commission has obviously encroached upon a field which has been restricted to the national government. Furthermore, the Commission was not set up as an agency to enforce the criminal laws of the State of California. If there be violations by Appellant or anyone else, the Attorney General or the appropriate District Attorneys have full authority to proceed through the Courts. It certainly is an unusual situation when an interstate user of comumunication facilities must forever be denied service upon a simple letter in the nature of a fiat from a law enforcement officer and upon the purported findings and order of a Commission which has injected itself into a field over which it has absolutely no authority. The least Appellant should expect under the American system would be that Appellee establish by competent proof any illegal acts which might justify refusal to restore such service.

SPECIFICATION OF ERROR III.

The District Court Erred in Its Tenth Conclusion of Law That Appellant Is Not Entitled to Any Order Compelling Restoration of His Service.

A. Distribution of Racing News Does Not Directly or Indirectly Violate Any Federal or State Law and Is Recognized in California as a Legitimate Business.

Appellant has shown elsewhere in this brief that it is the positive duty of a public utility subject to the terms and provisions of the Federal Communications Act to make available leased wire facilities to all who may subscribe for them, providing that such facilities shall not be used for any purpose or in any manner directly or indirectly in violation of any Federal law or the laws of any of the states. Distribution of racing news does not directly or indirectly violate any Federal or State law, and is recognized in California as a legitimate business. The District Court of Appeal of California, in *The People v. Brophy,* 49 Cal. App. (2d) 15, has pronounced that the furnishing or receiving of racing news does not violate any law. Many other decisions uphold the legality of racing news, including the following:

In re Capital Broadcasting Co., Report of F. C. C., Jan. 30, 1948;

Hagerty v. Coleman, 133 Fla. 363, 182 So. 776;

Commonwealth v. Western Union Tel. Co., 112 Ky. 355, 67 S. W. 59;

Penn. Publications, Inc. v. Penn. Public Utility Com., 349 Pa. 184, 36 A. (2d) 777;

Armstrong Racing Publications v. Moss, 43 N. Y. S. (2d) 171.

Capital Broadcasting Co., supra, concerned an application to the Commission for renewal of a radio station license and for a declaratory rule as to whether dissemination of racing news is contrary to public policy. The petitioner radio station gave race results and pari-mutuel prices paid at race tracks throughout the country ten minutes after the race had been run. This information was disseminated by the radio station continuously throughout the day. *The Federal Communications Commission held that it was not against the public policy of the commission to permit facilities under its jurisdiction to be used to disseminate racing news.*

The People v. Brophy, 49 Cal. App. (2d) 15, at page 33:

> "Public utilities and common carriers are not the censors of public or private morals, nor are they authorized or required to investigate or regulate the public or private conduct of those who seek service at their hands. Simply because persons who received information transmitted over the telephone facilities were enabled as a result of such information, if they were so inclined, to commit unlawful acts, does not make the telephone company a violator of the criminal laws. If such were the case, the telephone company would likewise be guilty in permitting its facilities to be used in transmitting information to the newspapers of the country as to prospective horse races or prize fights, because the information thus transmitted and published induced or enabled persons to engage unlawfully in betting on the results of such contests. The telephone company has no more right to refuse its facilities to persons because of a belief that such persons will use such service to transmit information that may enable recipients thereof to violate the law than a railroad company would have

to refuse to carry persons on its trains because those in charge of the train believed that the purpose of the persons so transported in going to a certain point was to commit an offense, or because the officers of such company were aware of the fact that the passengers were intent upon visiting a bookmaking establishment upon arrival at their destination, which establishment was maintained for the purpose of unlawfully receiving bets on horse races. *Furthermore, the furnishing or receiving of racing or sporting information is not gambling and is not a crime.* (*In re Teletype Machine No. 33335,* 126 Pa. Super. 533 [191 Atl. 210, 213]. For well considered and ably reasoned cases supporting the foregoing views, see *Commonwealth v. Western Union Tel. Co.,* 112 Ky. 335 [67 S. W. 59, 99 Am. St. Rep. 299, 57 L. R. A. 614], and *State v. Shaw,* 39 Minn. 153 [39 N. W. 305].)" (Emphasis supplied.)

In *Penn. Publications, Inc. v. Penn. Public Utility Commission, supra,* the telephone company cut off service of plaintiff who published certain scratch sheets and gave free telephone service as to race results. All scratch sheets were sold on newsstands, and not to the subscriber. Plaintiff claimed that it was doing a legal business. The Commission ruled against plaintiff and dismissed the complaint filed against the telephone company for discontinuing racing news service to the plaintiff. Its decision was affirmed by the Pennsylvania Court of Common Pleas. The highest Court in Pennsylvania, however, reversed the lower Court's decision, holding that publishing a scratch sheet and furnishing telephone service of race results is not an illegal business and that, consequently, the tele-

phone company had the positive duty to restore plaintiff's service. Said the Court, at page 779:

> *"In the instant case, the appellant is engaged in a legal business. The publication of a newspaper featuring horse racing is not illegal.* Horse racing is not prohibited by law in Pennsylvania, and there is nothing in our legislative history to indicate that it is contrary to public policy. Furthermore, there is nothing inherently wrongful in horse racing, and it is no more objectionable than baseball, football, and other sports. Betting is not a necessary concomitant of horse racing. It is a well known fact that many lovers of horses never place a bet on the result of a race, that while opposed to gambling they have a deep interest in developing and racing horses. Thousands upon thousands of people attend race meetings regularly for the enjoyment they get from the contests but have no interest in betting." (Emphasis supplied.)

Commenting on the failure of the telephone company to produce any evidence which could meet the burden placed upon it to justify its depriving the Appellant of telephone service, the Pennsylvania Court continues, at page 780:

> "Here there is absolutely no evidence to indicate that appellant was engaged in an unlawful enterprise. All that was here shown was that some recipients of the news distributed by appellant used or may have used it for an unlawful purpose. It would be just as absurd to contend that manufacturers of playing cards and dice were aiding and abetting gambling and should be denied telephone service because policemen found such objects when raids were made, as it is to argue that the appellant in the instant con-

troversy should be refused service because 'in the past several years practically every one of the numerous raids conducted by the Philadelphia vice squad on bookmakers and bookmaking establishments have revealed the use of complainant's publication.' "

In *Armstrong Racing Publications v. Moss, supra,* the Commissioner of Licenses of the City of New York made an order prohibiting sale of publications on newsstands on grounds they contained "racing tips" to bookmakers. The Court held that the Commissioner had no legal power to ban such publications from the newsstands. Said the Court, at page 174:

> "The court is not unmindful of the testimony of the police that invariably when arrests for 'bookmaking' * * * were made, a copy of one, several or all of the publications of these plaintiffs were found in the possession of the one arrested. * * * In the light of the custom, usage, ethics and psychology of our community, it seems fairer to measure these publications in the same way as similar information in the general newspapers of the community is concerned."

B. Under the Rules of Decision Act and Erie v. Tompkins Doctrine, the District Court Was Bound to Follow the Decision of the State Court in the Brophy Case Which Upheld the Legality of Disseminating Racing News.

The rules of Decision Act (28 U. S. C. A. §725) provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United

States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In the celebrated case of *Erie R. Co. v. Tompkins*. 304 U. S. 64, 82 L. Ed. 1188, Justice Brandeis declared that there is no Federal general common law and that except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state as interpreted by its legislature or its highest court. By a subsequent decision of the United States Supreme Court, the Erie doctrine was extended to include decisions of an intermediate state court where the highest court of the state had not spoken. In *Fidelity Union Trust Co. v. Field,* 311 U. S. 169, 85 L. Ed. 109, the Court states:

"We think that this ruling was erroneous. The highest state court is the final authority on state law (Beals v. Hale, 4 How. (U. S.) 37, 54, 11 L. ed. 865, 872; Erie R. Co. v. Tompkins, 304 U. S. 64, 78, 82 L. ed. 1188, 1194, 58 S. Ct. 817, 114 A. L. R. 1487), but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State. See Ruhlin v. New York L. Ins. Co., 304 U. S. 202, 209, 82 L. ed. 1290, 1294, 58 L. ed. 860. *An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question."* (Emphasis supplied.)

The principles enunciated by the *Erie* case have been affirmed in later decisions of the United States Supreme Court. See, for example:

Six Companies of California v. Joint Highway District No. 13 of the State of California, 311 U. S. 180, 85 L. Ed. 114;

Mason v. United States, 260 U. S. 545, 67 L. Ed. 396;

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290;

Cyc. Fed. Proc., Vol. 5, Sec. 589, *et seq.*

The California court in the *Brophy* case, *supra,* has declared that the business of diseminating racing news does not violate the law. This decision enunciates the present law in California on this subject, and, it is respectfully submitted, should be controlling in the instant controversy.

C. Where a Utility Company Is Asked to Restore Service It Must Exercise Independent Judgment as to Whether Customer Is Violating the Law and May Not Rely on Unsubstantiated Statements of Law Enforcement Officers.

Appellant's contention throughout this brief has been that he conducts a business which does not violate any Federal law or the laws of any state. Under the provisions of the Federal Communications Act, he has a positive right to the private wire facilities which he has heretofore had in use. The issue raised by the pleadings in this case is simply whether or not Appellant is entitled

to said facilities; and Appellant does not believe that Appellee can justify its refusal to restore the withheld service by invoking the convenient apologetics of Tariff Regulation No. 219 or by relying on unsubstantiated statements of local law enforcement officers. The following cases support Appellant's contention:

Giordullo v. Cincinnati & Suburban Bell Tel. Co. (Ct. of C. Pleas, Ohio, 1946), 71 N. E. (2d) 858, at page 859:

> "If that is true it seems to the court that the defendant had the right to withdraw plaintiff's telephone service. When it comes to the trial of this case the Telephone Company will be required to prove that defense by preponderance of the evidence and the letter of the Chief of Police requesting defendant to withdraw plaintiff's telephone service will not even be proper evidence in the case."

Shillitani v. Valentine, et al., 296 N. Y. 161, 71 N. E. (2d) 450. This case concerned a proceeding in mandamus under the New York statute to compel the restoration of telephone service which had been discontinued by defendant company on advice from the Police Commissioner that petitioner was engaged in conduct contrary to the Penal Law. Although the New York Court of Appeals held that, under the circumstances of the case, there was no warrant for compelling the telephone company to reinstate its service for petitioner, it ruled, with respect to petitioner's rights, at page 451:

> "Neither the Police Commissioner nor the Police Department is given any authority by statute * * *

to require a telephone company to withhold or discontinue its service. Approval of the commissioner is not a statutory condition precedent to the granting of the relief sought by appellant, and there is no warrant or need for any direction to him in this proceeding.

"Whether or no service should be terminated or discontinued is a decision that must be made by the telephone company. That power—as well as duty—rests with the public utility, and it may not delegate the one or avoid the other. * * * whether the action is justified or warranted must be determined by the telephone company upon the facts presented."

Salter v. New York Telephone Co. (Sup. Ct., 1946), 67 N. Y. S. (2d) 396. This was an application by petitioner for an order directing the Police Commissioner of the City of New York to approve, and the New York Telephone Company to restore, telephone service heretofore furnished to petitioner at his place of business. He had been arrested and charged with bookmaking in his business premises and at the same time his telephone was removed. The charge of bookmaking was dismissed in the Magistrate's Court, and petitioner was acquitted, but the telephone company had refused to restore service without the consent of the Police Commissioner, who declined to approve petitioner's application. The Court held that petitioner was entitled to have his telephone service restored without delay.

SPECIFICATION OF ERROR IV.

The District Court Erred in Its Seventh and Eighth Conclusions of Law Requiring (a) That the Attorney General of the United States Make Application to Said Court Alleging a Violation of the Communications Act and (b) That the Mandamus Action Be Maintained Upon the Relation of a Person Alleging a Violation of Said Act.

The District Court made the following conclusions of law [R. 96]:

> "7. No application of the Attorney General of the United States, either at the request of the Federal Communications Commission or otherwise has been made herein to this court or otherwise or at all, alleging any failure of defendant to comply with any provision of Chapter 5, Title 47 of the United States Code;
>
> "8. This action was not commenced nor is it being maintained upon the relation of any person alleging any violation by defendant of any provision of said Chapter 5, Title 47 of the United States Code which prevents any such relator from receiving defendant's service in interstate or foreign communication by wire at the same charges or upon terms and conditions as favorable as those given by defendant for like communication or transmission under similar conditions to any other person;"

Respecting the Seventh Conclusion of Law of the District Court, Appellant calls attention to the provisions of §401 (47 U. S. C. A., §401) of the Communications Act

upon which provisions rests the conclusion of the District Court. The section reads, in part, as follows:

> "§401. Enforcement of chapter and orders of commission; jurisdiction.
>
> "(a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter."

It is patent that Congress, in §401(a), merely provides suitable machinery whereby the Federal Communications Commission can take the initiative in compelling enforcement of the terms of the Communications Act. Section 401(b) permits the F. C. C. to enforce in the same manner its own orders. Without §401, permitting the F. C. C. the right to have the Attorney General prosecute in its behalf, the F. C. C. would be unable to compel enforcement of its orders.

Section 406 of the Act compelling furnishing of facilities, is, as Appellant points out in Specification of Error I, a specific grant of jurisdiction by Congress to the District Courts and is entirely independent of §401(a) of that Act.

The District Court's conclusion of law No. 8 [R. 96] to the effect that this action was not commenced nor is it being maintained upon the relation of any person seems to be of no importance. However, it should be pointed out that the Federal Rules of Civil Procedure specifically abol-

ish the "writ" of mandamus and provide that the relief heretofore available by mandamus is now obtained by appropriate action or by appropriate motion under the practice prescribed by the Rules. F. R. C. P., Rule 81(b).

The note by the Advisory Committee on the effect of Rule 81(b) reads as follows:

> "Note to Subdivision (b). Some statutes which will be affected by this subdivision are: * * * U. S. C., Title 47:
>
> §11 (Powers of Federal Communications Commission)
>
> §401 (a) (Enforcement of Federal Communications Act and orders of Commission)
>
> §406 (Same; compelling furnishing of facilities; mandamus)"

With respect to the requirement of Rule 81(b) of the Federal Rules of Civil Procedure that relief heretofore obtainable by mandamus may be obtained by appropriate action under the Rules, it is stated in Cyc. Fed. Proc., Vol. 13, §7066, at page 622:

> "* * * the general rules contained in such Federal Rules as to pleading and complaints, as stated in a preceding chapter, are applicable. A complaint should be substituted for the petition theretofore used. *Leave to file a complaint for mandamus is unnecessary and inappropriate when mandamus is sought in a district court.*" (Emphasis supplied.)

See:

Youngblood v. U. S. (6th Cir.), 141 F. (2d) 912, 915.

SPECIFICATION OF ERROR V.

The District Court's Finding of Fact That Appellant Does Not Show Irreparable Damage Is Not Supported by the Record; And the Court Further Erred in Denying Appellant's Request for a Preliminary Injunction.

The District Court made the following finding of fact:

> "It is not true that the refusal and failure of defendant to supply plaintiff with interstate Morse wire or other public utility facilities has caused or will cause plaintiff irreparable damage." [R. 92.]

The District Court also, in its 9th conclusion of law, held that Appellant was not entitled to a preliminary injunction [R. 97].

As heretofore pointed out, Appellant's complaint alleged two causes of action—the first seeking an order compelling the restoration of its leased wire service, and the second for a preliminary and permanent injunction restraining Appellee from refusing to furnish Appellant such service.

While it is recognized that, as a general principle, equitable relief will not be extended where an adequate legal remedy exists, Appellant, in keeping with the usual caution customary in the legal profession, sought relief, both legal and equitable—the legal relief sought being under Section 406 of the Communications Act and the equitable relief by way of injunction. Rule 8(e)(2), Federal Rules of Civil Procedure, provides in part:

> "A party may also state as many separate claims or defenses as he has regardless of consistency and *whether based on legal or on equitable grounds, or on both.*" (Emphasis supplied.)

If, by any chance, this Court should decide that Section 406 of the Communications Act does not afford Appellant a hearing in the District Court, then it would appear that Appellant would be entitled to equitable relief. First of all the District Court did have jurisdiction in that the District Court's findings disclosed that Appellant was a citizen and resident of the State of Ohio, and that the amount in controversy exceeded $3,000.00 exclusive of interest and costs. Since the forum of the suit is California, the District Court had jurisdiction under 28 U. S. C. A., §41(1).

The District Court having jurisdiction of the parties could afford Appellant equitable relief if the refusal and failure of Appellee to supply Appellant with the wire service was causing and did cause Appellant irreparable damage for which he had no adequate remedy at law, provided, of course, Appellant was legally entitled to the service. The District Court, however, in its findings, determined that the failure of Appellee to supply Appellant with interstate Morse wire service had not caused and was not causing Appellant irreparable damage [R. 92]. It is submitted that this finding is wholly inconsistent with the facts set forth in the pleadings and supporting affidavits, and that, on the contrary, it is clearly shown that Appellant was suffering and did continue to suffer irreparable damage.

Appellant's complaint and his supporting affidavits clearly and affirmatively show that Appellant was supplying news over the interstate Morse wire to its customer, Consolidated Publishing Company of Los Angeles, California, and was receiving pay at the rate of approximately $500 a week for such service, and that, without such wire service, it would be unable to furnish its news to

Consolidated. Not only did Appellant suffer irreparable damage, but also its customer, Consolidated [R. 6].

With further reference to the matter of the Complaint containing both a claim for legal and equitable relief, it should be noted that it has been held that, in a proper case, an equitable suit might be brought in aid of an action for mandamus. (*City of Wheeling v. John F. Casey Co.,* (4 Cir.) 85 F. (2d) 922, 924.)

Of course, Appellant emphatically reasserts his contention which has been maintained since the inception of this suit—namely, that the District Court was authorized under Section 406 to afford the relief prayed for in the second cause of action of the Complaint.

Conclusion.

Appellant again emphasizes the fact that this case presents a simple question of whether or not Appellant is entitled to have his interstate Morse wire connection with Consolidated restored by Appellee. Appellant contends that his company is carrying on a business which has been declared legal by the Courts of the State of California, and that no showing has been made in this case of any illegal activity on its part. On the other hand, Appellee has not asserted that Appellant is engaged in any illegal activity but has predicated its Answer upon the order of the Public Utilities Commission of California and the letter of the Attorney General of that State. Neither of these documents has any probative quality in this litigation, and, in fact, would be wholly irrelevant and immaterial in determining whether or not Appellant was or was not actually engaged in an illegal business if it were open to question.

Whether or not Appellee had a right to rely upon Tariff Regulation No. 219 or whether such Tariff is reasonable is not an issue in the case, for the act of terminating the service has long since passed, and Appellant now faces Appellee with the assertion of his right to the Morse wire facility in question. Appellee is either justified or not in refusing to furnish such service to Appellant, and that must be determined upon the actual facts and not upon gratuitous statements of any State law-enforcement officer or extra-legal opinions of any State Commission.

If Appellant is violating the law and is not entitled to the leased wire service, then Appellee's Answer should set forth the facts and apprize Appellant and the Court wherein the justification lies for Appellee's refusal.

It is respectfully submitted that the order and judgment of the District Court be reversed and that an order be entered compelling Appellee, the Western Union Telegraph Company, to furnish Appellant with the interstate Morse wire facilities heretofore existing between Appellant and its customer, Consolidated Publishing Company of Los Angeles, California.

Respectfully submitted,

CHARLES H. CARR,

Attorney for Appellant.